Item W97-17 Cover Sheet

Please **write** or **fax** or **e-mail** your comments to:

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Internet	**romunda_price@jud.ca.gov**
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Name _____

Organization _____

DEADLINE FOR COMMENT: March 7, 1997, 5:00 P.M.

Electronic Access to Court Records.

Agree with proposed changes

Do not agree with proposed changes

Comments: _____

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Court Technology Committee
Draft Rule

RULE. ACCESS TO ELECTRONIC RECORDS

(a) **[Purpose]** This rule addresses public access to electronic records. It does not apply to access to electronic records by litigants or their attorneys who are actively involved in a case before a court or to authorized personnel of a court or a judicial branch agency.

(b) **[Definitions]**

(1) "The judicial branch" consists of the courts, as courts are defined in article VI of the California Constitution, the Judicial Council of California, and the Administrative Office of the Courts.

(2) "A judicial branch agency" is a court, the Judicial Council of California, or the Administrative Office of the Courts.

(3) "Electronic records" are records held in electronic format.

(4) "Electronic format" includes computerized records, whether created by data entry, electronic filing, or digital imaging. The term does not include records on microfiche, paper, or any other medium.

(5) "Access" is the ability to make use of electronic records by any means.

(6) "A record" is documentation that accurately reflects the official case-related work of a court, that constitutes court action, or that otherwise reflects the official actions of a judicial branch agency. Records include those items listed in Government Code §§ 68151(a) and 68152(j). Records do not include personal notes or preliminary memoranda of judges or other judicial branch personnel.

(c) **[Scope]** This rule applies to electronic records prepared, owned, used, or retained by judicial branch agencies. As to those electronic records prepared, owned, used, or retained by judicial branch agencies that do not fall within the scope of this rule, no policy is implied, either in favor of or opposing public dissemination. Issues regarding records outside the scope of the rule are left to resolution by the courts in accordance with current law.

(d) **[Information Policy]** Any record that a judicial branch agency makes available to the public shall be made available electronically, to the extent that the agency has determined that it has sufficient resources to do so. Such a determination shall obligate the agency to comply with this rule. Electronic access may be provided at the agency's place of business, remotely, or both at the place of business and at remote locations. Remote access shall not be provided,

however, to information in records that by law becomes unavailable automatically after the passage of time or the occurrence of certain events.

(1) Direct electronic access to court records must be reasonably available to individual citizens and must include access through public terminals at the courthouse, and when feasible at off-site locations such as public libraries.

(2) All the software features of any system that the court uses to manage its records need not be made available for direct electronic access by the public, as long as public information is reasonably accessible by means of software that is based on industry standards or that is in the public domain.

(3) A judicial branch agency shall determine whether or not it has sufficient resources to convert to an electronic medium any record created in another medium.

(e) **[Fees for Public Electronic Access to Electronic Records]** A judicial branch agency that provides access to electronic records may impose fees sufficient to recover the marginal costs of providing the access, as these costs are defined in Government Code section 68150(h). A statement of the costs that comprise such fees shall be provided to the public.

(f) **[Contracts with vendors]** A judicial branch agency that elects to contract with a vendor to release its information electronically must also provide the public with direct electronic access to the information to the extent that this rule requires and at fees no greater than those prescribed by this rule. The contract shall require the vendor to protect confidentiality as required by law.

(g) **[Procedures]** A public records administrator shall be designated in each judicial branch agency.

(1) The public records administrator is responsible for developing and making available to the public information regarding access to electronic records, particularly the means for an individual's accessing his or her own records, and procedures for protecting data that this policy designates as confidential.

(2) The public records administrator is responsible for providing appropriate training for staff members implementing this rule.

(3) Any person who alleges that access to electronic records has been improperly denied or granted under the terms of this rule may request the public records administrator to make a determination regarding the propriety of that access.

(4) A determination of the public records administrator either granting or denying access to electronic records may be appealed by any person to the presiding judge or, in the case of the Judicial Council or Administrative Office of the Courts, to the Administrative Director of the Courts, who is also the Secretary to the Judicial Council.

Court Technology Committee
Draft Rule

RULE. ACCESS TO ELECTRONIC RECORDS
DRAFTERS' COMMENTS

Rule text	***Comments***
(a) **[Purpose]** This rule addresses public access to electronic records. It does not apply to access to electronic records by litigants or their attorneys who are actively involved in a case before a court or to authorized personnel of a court or a judicial branch agency.	*In keeping with the charge to the Court Technology Committee regarding the fulfillment of its duty under Rule of Court 1033(b)(4),*[1] *the rule addresses public access to computerized records held by courts, the Judicial Council, or the Administrative Office of the Courts in electronic format, whether created by data entry, electronic filing, or digital imaging. It does not address records held in paper form, microfiche, or other microform, to which current statutes and rules will continue to apply.*
(b) **[Definitions]**	
(1) "The judicial branch" consists of the courts, as courts are defined in article VI of the California Constitution, the Judicial Council of California, and the Administrative Office of the Courts.	
(2) "A judicial branch agency" is a court, the Judicial Council of California, or the Administrative Office of the Courts.	

[1] *"In accordance with its guiding principles as approved by the Judicial Council, the committee shall . . . Propose to the council rules of court, standards of judicial administration, and recommended legislation to balance the interests of privacy, access, and security in relation to court technology."*

Rule text	***Comments***
(3) "Electronic records" are records held in electronic format.	
(4) "Electronic format" includes computerized records, whether created by data entry, electronic filing, or digital imaging. The term does not include records on microfiche, paper, or any other medium.	*The rule is not meant to imply any new limitations on access to paper records, even if those records are generated from electronic files. Information which is now preserved in paper records is intended to remain governed by current rules and statutes when such information is accessed in paper form, i.e., when the person or entity receiving the information receives it from the courts on paper, rather than electronically.*
(5) "Access" is the ability to make use of electronic records by any means.	
(6) "A record" is documentation that accurately reflects the official case-related work of a court, that constitutes court action, or that otherwise reflects the official actions of a judicial branch agency.	*This definition derives from the description of "Category I" documents in* Copley Press, Inc. *v.* Superior Court *(1992) 6 Cal.App.4th 106, 113, 7 Cal.Rptr.2d 841, 845: "The first class [of documents] represents documentation which accurately and officially reflects the work of the court, such as its orders and judgments, its scheduling and administration of cases, its assignment of judicial officers and administrators. Included in such documentation, which we will call Category I documents, would be the official court minutes, all its written orders and dispositions, the official reports of oral proceedings, and the master calendar. Also included in Category I of court documents would be the various documents filed in or received by the court, such as the pleadings and motions filed by the parties and the evidence admitted in court proceedings. All of these documents represent and reflect the official work of the court, in which the public and press have a justifiable interest." The court held that the court clerk's rough minute book fell in category I because it "presumptively contains only accurate,*

Rule text	***Comments***
	descriptive and non-discretionary information." 6 Cal.App.4th 115, 7 Cal.Rptr.2d 847.
Records include those items listed in Government Code §§ 68151(a) and 68152(j).	*Gov. Code § 68151(a) provides as follows:* *"(a)'Court record' shall consist of the following:* *(1) All filed papers and documents in the case folder; but if no case folder is created by the court, all filed papers and documents that would have been in the case folder if one had been created.* *(2) Administrative records, depositions, exhibits, transcripts, including preliminary hearing transcripts, and tapes of electronically recorded proceedings filed, lodged, or maintained in connection with the case, unless disposed of earlier in the case pursuant to law.* *(3) Other records listed under subdivision (j) of Gov. Code § 68152."* *Gov. Code § 68152(j) provides, in pertinent part, as follows:* *"(j) Other records.* *(1) Applications in forma pauperis . . .* *(2) Arrest warrant . . .* *(3) Bench warrant . . .* *(4) Bond . . .* *(5) Coroner's inquest report . . .* *(6) Court order not associated with the underlying case, such as orders for destruction of court records for telephone taps, or to destroy drugs, and other miscellaneous court*

Rule text	***Comments***
	orders . . . *(7) Court reporter notes . . .* *(8) Electronic recordings made as the official record of the oral proceedings under the California Rules of Court . . .* *(9) Electronic recordings not made as the official record of the oral proceedings under the California Rules of Court . . .* *(10) Index . . .* *(11) Index for cases alleging traffic violations . . .* *(12) Judgments within the jurisdiction of the superior court . . .* *(13) Judgments within the jurisdiction of the municipal and justice court . . .* *(14) Minutes . . .* *(16) Ninety-day evaluation [see Gov. Code § 1203.03 of the Penal Code] . . .* *(17) Register of actions or docket . . .* *(18) Search warrant . . .”*
Records do not include personal notes or preliminary memoranda of judges or other judicial branch personnel.	*According to the court in Copley, “Category II” documents include “preliminary drafts, personal notes and rough records [which] . . .do not speak for the court and do not constitute court action.” 6 Cal.App.4th 114, 7 Cal.Rptr.2d 846. “Before a judgment goes out there is usually a draft prepared and then edited. Jury instructions are written and rewritten. Informal notes are prepared by judges to assist them in conducting voir dire. Most judges keep personal notes of the testimony and argument brought to their court. Court reporters keep original notes, which are corrected and amplified before a final reporter’s*

Rule text	***Comments***
	transcript is issued. If we look to the courts of appeal, we will find enormous quantities of initial drafts, memoranda, critical analyses of others' work, and all kinds of preliminary writings. All of this material . . . is created in the course of judicial work and for the purpose of carrying out judicial duties . . . [H]owever, . . .none of such material should be the subject of public inspection." 6 Cal.App.4th 114. 7 Cal.Rptr.2d 846. Electronic transaction records, showing who has requested files or information, do not fall within the rule's definition of "records."
(c) **[Scope]** This rule applies to electronic records prepared, owned, used, or retained by judicial branch agencies.	*The California Public Records Act, Gov. Code § 6252(a), excludes from coverage judicial branch agencies, i.e., those governed by article VI of the California Constitution. The rule will apply to such agencies, except for those which do not fall under the jurisdiction of the California Judicial Council. Excluded agencies include the State Bar Court and the Commission on Judicial Performance. Included are courts at all levels and the Administrative Office of the Courts.*
As to those electronic records prepared, owned, used, or retained by judicial branch agencies that do not fall within the scope of this rule, no policy is implied, either in favor of or opposing public dissemination. Issues regarding records outside the scope of the rule are left to resolution by the courts in accordance with current law.	
(d) **[Information Policy]** Any record that a judicial branch agency makes available to the	*Certain statutes require that records public at one time are automatically to be sealed, made confidential, or destroyed after passage of time*

Rule text

public shall be made available electronically, to the extent that the agency has determined that it has sufficient resources to do so. Such a determination shall obligate the agency to comply with this rule. Electronic access may be provided at the agency's place of business, remotely, or both at the place of business and at remote locations. Remote access shall not be provided, however, to information in records that by law becomes unavailable automatically after the passage of time or the occurrence of certain events.

Comments

or occurrence of certain events. Remote access shall not be provided to these records. Such statutes include but are not limited to the following:

1. *Welfare and Institutions Code § 4514. Developmentally Disabled Assessment Reports, to be sealed after sentencing.*
2. *Welfare and Institutions Code § 5328. Mental Health Service Records, sealed to third parties after sentencing.*
3. *Penal Code § 1203.5. Pre-Sentence Probation Report, confidential after 60 days from sentencing or granting of probation.*
4. *Welfare and Institutions Code § 707.4. Adult court criminal records involving minors that do not result in conviction to be sent to juvenile court, to obliterate minor's name in adult court index or record book.*
5. *Health and Safety Code § 11361.5(c). Records (except for transcripts or appellate opinions) of arrest or conviction for marijuana possession (pursuant to Health and Safety Code §§ 11357 [except subsection a] and 11360(b)), to be destroyed two years from date of arrest or conviction.*
6. *Code of Civil Procedure § 237. Juror personal identifying information after verdict, to be confidential.*

Certain statutes provide that information that was public at one time may, on petition and proof of certain circumstances, be sealed, modified, made confidential, or destroyed. Remote access shall be provided to this information until the court determines that it is to be sealed, modified, made

confidential, or destroyed. Such statutes include but are not limited to the following:

7. *Penal Code § 851.85. Criminal records, after acquittal, on finding by trial judge of factual innocence, may be sealed.*
8. *Penal Code § 851.7. Records of arrest or criminal proceedings of minor charged with misdemeanor, upon release for lack of evidence, discharge without conviction, or acquittal, may be sealed, subject to limited-duration re-opening during defamation action.*
9. *Penal Code § 1203.4. Criminal proceedings resulting in conviction and a sentence of probation, or in the "interests of justice," may be modified by changing a plea to not guilty or setting aside a verdict and dismissing an accusation, on petition and proof of successful completion of probation (though the original conviction may be pleaded and proved in a subsequent criminal proceeding or for certain other specified purposes).*
10. *Penal Code § 1203.4a. Misdemeanor proceedings resulting in a conviction may be modified on petition and proof that one year has elapsed from the date of judgment, sentence has been fully complied with, and no other crimes have been committed.*
11. *Penal Code § 1203.45. Minor who would qualify for modification of criminal records in accordance with Penal Code §§ 1203.4 or 1203.4a may petition to have the records sealed.*
12. *Welfare and Institutions Code §781. Juveniles declared wards of the court*

Rule text	***Comments***
	may on petition have their juvenile court records (including those made public by Welfare and Institutions Code § 676) sealed five years after the jurisdiction of the court ceases or the juvenile reaches 18, if there are no subsequent convictions involving felonies or moral turpitude, and there is a finding of rehabilitation.
(1) Direct electronic access to court records must be reasonably available to individual citizens and must include access through public terminals at the courthouse, and when feasible at off-site locations such as public libraries.	*While some legislation distinguishes "optional" or "enhanced" services, see Gov. Code §§ 25330 et seq., these distinctions do not offer meaningful guidance in the context of rapidly evolving computer technology. Testimony from citizens and representatives of the information industry raised the concern that commercial motives would drive public policy decisions regarding public access to and protection of electronic court records.*
(2) All the software features of any system that the court uses to manage its records need not be made available for direct electronic access by the public, as long as public information is reasonably accessible by means of software that is based on industry standards or that is in the public domain.	
(3) A judicial branch agency shall determine whether or not it has sufficient resources to convert to an electronic medium any record created in	*The degree to which a court may be able to grant electronic access to its records will be limited by the technology and personnel that it has available to it. The rule is not intended to require a degree of access which a court cannot afford to*

Rule text	*Comments*
another medium.	*provide.*
(e) **[Fees for Public Electronic Access to Electronic Records]** A judicial branch agency that provides access to electronic records may impose fees sufficient to recover the marginal costs of providing the access, as these costs are defined in Government Code section 68150(h). A statement of the costs that comprise such fees shall be provided to the public.	*The intent of the rule is to implement Gov. Code § 68150(h), which provides that "Court records preserved or reproduced under subdivisions (a) and (b) shall be made reasonably accessible to all members of the public for viewing and duplication as would the paper records. Reasonable provision shall be made for duplicating the records at cost. Cost shall consist of all costs associated with duplicating the records as determined by the court." The rule allows for recovery of only marginal costs of various types of distribution, rather than for funding systems development, maintenance, or the like. Although the rule does not contain an itemized list of costs that may be included in fees, as a matter of public accountability the court or agency should identify for the public the costs that comprise such fees.*
(f) **[Contracts with vendors]** A judicial branch agency that elects to contract with a vendor to release its information electronically must also provide the public with direct electronic access to the information to the extent that this rule requires and at fees no greater than those prescribed by this rule. The contract shall require the vendor to protect confidentiality as required by law.	*In light of testimony at public hearings, the committee has recommended that the rule provide protection for citizen access to and confidentiality of electronic court records when courts or counties enter into contracts with private vendors for the computerization of court records. While public-private partnerships have the potential to enhance access to, and protection of, court records, they also have the potential to undermine goals of access and protection if private entities are given ultimate decision-making authority over the cost and methods of access to such records.*
(g) **[Procedures]** A public records administrator shall be designated in each judicial branch agency.	*So that those seeking access to, or privacy protection for, electronic court records have a means of obtaining a preliminary administrative ruling or authoritative source of information on public records policy, the rule requires that a public records administrator be designated in*

Rule text	***Comments***
	each court. The assignment of this responsibility is left to local discretion. The rule assumes that someone in an existing position can discharge the responsibility, and it does not intend to imply that a new position must be created. Ultimately, decisions regarding the application of policy are to be made by the courts. The rule does not purport to address or alter that process. See, e.g., Copley Press, Inc. *v.* Superior Court *(1992) 6 Cal.App.4th 106, 113, 7 Cal.Rptr.2d 841, 845.*
(1) The public records administrator is responsible for developing and making available to the public information regarding access to electronic records, particularly the means for an individual's accessing his or her own records, and procedures for protecting data that this policy designates as confidential.	*The rule does not address or purport to alter current procedures for modification of court records, which should remain a judicial, rather than administrative, function.*
(2) The public records administrator is responsible for providing appropriate training for staff members implementing this rule.	
(3) Any person who alleges that access to electronic records has been improperly denied or granted under the terms of this rule may request the public records administrator to make a determination regarding the propriety of that access.	
(4) A determination of the public records administrator either granting or denying	

Rule text	***Comments***
access to electronic records may be appealed by any person to the presiding judge or, in the case of the Judicial Council or Administrative Office of the Courts, to the Administrative Director of the Courts, who is also the Secretary to the Judicial Council.	

Opposing Argument

The goal of any policy governing public distribution of the records of which the courts are the steward must be to address and reconcile, so far as possible, three public interest goals: open access to government records, the informational privacy of citizens, and using taxpayer dollars efficiently. Considerations of government efficiency require that court records continue to be brought into electronic form. A cautious approach to the issue of unrestricted electronic access to such records will in the long run best serve the advancement of such technology. While the rule as currently drafted addresses concerns of the members of the public interested in open access to court documents, it does not adequately address the concerns of the members of the public whose records will now be much more accessible than tradition has led them to expect.

The courts have a set of records that uniquely brings into relief conflicting values of open access and privacy. On the one hand, unlike the protections established by many executive department agencies that maintain records on individual citizens, constitutional and common law protections of access to open court proceedings underscore the importance of the public's ability to monitor the courts' treatment of individual citizens, and the need to protect against the reintroduction of star chamber proceedings in a democracy. On the other hand, court records, unlike legislative records, are composed of records regarding individual citizens, often of a highly sensitive nature. Unlike the records of a private entity, court records contain much information that has not been provided on a voluntary basis, but solely because the individuals were compelled to do so by virtue of being sued, subpoenaed or summoned for jury duty. The advent of the computer age has heightened the public's awareness of the importance of limits on the government's dissemination and use of personal information, an awareness that is also vital to the healthy functioning of a democracy.

The fundamental argument against the approach of the rule on access to electronic court records as it is currently drafted by the Court Technology Committee is stated in the answer to this question: should electronic records be treated differently from paper records? The answer of the Court Technology Committee in this draft is "no."

This response fails to acknowledge the differences between paper records and computerized records. These differences require that public access and privacy questions be answered differently for computerized records and paper records, even in order to preserve protections and confidentiality provisions that currently exist in law. This was the primary thrust of the decision in *Westbrook* v. *County of Los Angeles,* 27 Cal. App. 4th 157, 32 Cal. Rptr. 2d 382 (1994), which recognized that once court records become computerized, the only way to preserve the legislative policy and integrity of the system of limited access embodied in the criminal history statutes is to extend those same protections to the courts' records. Similarly, if the courts' rules do not recognize a distinction between computer records and paper records, to the extent that paper records become more computerized, the courts' electronic records will become the primary vehicle for circumventing public policy protections extended by the Legislature to records held by other agencies.

Computer records differ from paper records in three basic respects: ease of access, ease of compilation, and ease of wholesale duplication.

First, computer records are easily, casually, and anonymously accessed. This ease of access is the primary reason that advocates of open access so strongly urge the most open access possible. Certainly this ease makes monitoring of the operations of the court more practical for members of the press or public than a laborious search of paper files at the courthouse. On the other hand, it is this very ease of access that gives rise to public concerns ranging from personal or financial security to a simple desire to be left alone.

Despite the prediction of some in the information industry that citizens will simply abandon all expectation that their privacy will be protected as the amount of personal information in computer databases proliferates, recent legislation protecting residential addresses held by other public agencies suggests an increasing public demand for limits on distribution of information about individuals unless there is a sound policy reason for its release, especially with respect to information with an obvious potential for damaging or dangerous consequences. It would be far preferable that citizens not be shocked by future media stories of the dire consequences of the ease of anonymous access to their residential addresses, financial and credit information, or personal identifiers used to verify identity, when those items appear in computerized court records. Nor does sound public policy appear to require that individual citizens take on the burden of seeing that information is protected through currently established court procedures for sealing, which were designed for a paper system. Responsible stewardship of information that has been obtained through compulsion of law requires proceeding with great caution, and only in the interest of the soundest public policy, in widespread public release of information that has relatively little relevance to the public's ability to monitor the institutional operation of the courts but relatively great impact on the degree of personal and financial security of citizens who come in contact with the court as litigants, witnesses, or jurors.

Second, computer records can be compiled, searched and sorted in a variety of ways that in a practical sense distinguish their use from that of paper records. It would not be cost-efficient or practical to make a manual search of courthouse records for a linkage of names and residential addresses or to compile a list of cases by names of judges or attorneys. Once these bits of information are computerized, however, they can be extracted as discrete items of information, packaged and sold. A market can also be readily imagined for financial information available in civil, family and probate records, especially when linked to names and addresses.

The practical impact of this compilation capability on privacy was recognized by the United States Supreme Court in *Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989), which held that considerations of privacy outweighed the policy of open access under the federal Freedom of Information Act when what was sought by the press was access to those portions of the FBI's criminal history files that were already matters of public record. "Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." 109 S. Ct. at 1477. Furthermore, "[w]hen the subject of [a record] is a

private citizen and when the information is in the Government's control as a compilation, rather than as a record of 'what the Government is up to,' the privacy interest . . . is in fact at its apex while the . . . public interest in disclosure is at its nadir." *Id.* at 1485.

Finally, computer records differ from paper records in that they enable those with electronic access to capture the information in the records wholesale. It now will become practical for individuals or organizations outside the court system to duplicate the entirety of the courts' files. In the current state of technology, electronic access is essentially equivalent to the ability to download the files that are so accessed, as well as the ability to store such information indefinitely. The potential for the proliferation of such private databases, derived from court electronic records, to undermine legislative policies governing confidentiality of court records was recognized in *Westbrook* v. *County of Los Angeles, supra,* which found a "qualitative difference between obtaining information for a specific docket or on a specified individual, and obtaining docket information on every person against whom criminal charges are pending in municipal court." 27 Cal. App. 4th at 165, 32 Cal. Rptr. 2d at 387. In effect, the entire database was the equivalent of the computerized criminal history records, dissemination of which the Legislature had carefully limited in Penal Code §§ 13300 *et seq.* and Labor Code § 432.7(g). The unrestricted dissemination of computerized court records would allow the creation of private databases that would clearly make irrelevant the policy balances and restrictions contained in the many statutes addressed to dissemination of criminal history information.

The creation of such databases would also threaten to nullify the effect of the many statutes that grant various levels of confidentiality to criminal records after the passage of time, contingent on findings ranging from factual innocence to absence of a repeat offense. Whatever the policy wisdom of such choices, a whole series of legislative policy decisions has assumed, based on a paper record system, that a record that has been "modified," "sealed," "expunged," or "obliterated" is to that extent no longer available for public inspection. Private databases of court records would be under no such restrictions.

The courts should proceed cautiously with the electronic dissemination of their records until the full import of the changes, including the changes in public expectations of their governmental agencies, can be assessed. It is clear that it will be easier to open access later, than it will be to protect citizens' privacy once their records have been released to private databanks.

The draft rule would permit compilation and sorting of lists of plaintiffs, defendants, attorneys, and judges. Proceeding cautiously, however, should mean that the courts provide public electronic access only to specified index information in case files, exclusive of all non-public data and direct or indirect references to case numbers, courts, or persons other than parties and their attorneys. This approach would account to the public for the operation of the court system without undermining existing legal provisions for confidentiality and without exposing individuals to undue scrutiny. It would also satisfy the requirement that clerks of the superior courts (Government Code § 69842) and municipal courts (Government Code § 71280.3) keep indexes that insure ready reference to any action or proceeding filed in court.

The position advocated here has been criticized by those in the press and information industries for relying on horror stories that might or might not materialize. In essence, however, the position of the advocates of immediate open access also relies on a hypothetical scenario: the instantaneous conversion of court records to an all-electronic environment. It is indeed highly likely that ultimately this will be the case. The courts currently find themselves transitioning from paper to electronic records, a transition that is likely to take a number of years to accomplish.

In the common law tradition, there should be a step-by-step approach, which takes advantage of the transitional period in which paper and computer records exist together to gain the experience required to make the best ultimate judgment regarding the balance of privacy and access that will most fairly meet the objectives of granting maximum public opportunity to monitor the courts' performance while granting appropriate protection to citizens who must participate in the court system, whether as litigants, witnesses or jurors. The current system of determining what is part of a public court file may need to be refined in light of developing technology, so that some middle ground may be found between sealing and wholesale broadcast of information. Policy considerations governing electronic release of court information may be quite different if the Legislature should impose regulations on the information brokers that would require them to observe confidentiality provisions attached to any government databases from which they derive that information.

In the meantime, policy must be conservative in establishing protections, precisely so that the courts can be free to take advantage of the new technology without fear of undermining citizens' confidence in the courts' ability to provide protections that they may well believe are guaranteed by the constitutional right of privacy.

Supporting Argument

The draft rule proposes few restrictions on access to courts' electronic records for the following reasons:

- A court record should be treated uniformly whether it is kept in paper form or electronically and whether it is accessed in person or by electronic means. The same safeguards should apply to all the forms in which records are kept.
- The judicial branch has espoused paperless courts.[2] Policies requiring that certain data in court records be provided only in paper form are antithetical to the goal of reducing paper in court operations.
- Imposing access restrictions on electronic records that do not apply to paper records is a disincentive to court automation, which the Court Technology Committee is charged with promoting.
- In providing electronic access, the courts should offer at least what they offer now, not less.
- Certain data must be deleted from court records after a statutorily defined period of time. The draft rule attempts to identify this data and thus support the statutes requiring its deletion.
- *Westbrook* v. *County of Los Angeles* (1994) 27 Cal.App.4th 157, 32 Cal.Rptr.2d 382, prohibited a court from releasing compiled Criminal Offender Record Information (CORI) that the public cannot obtain from the law enforcement agencies that supply the data to the courts. Although the courts are not CORI agencies, they should not undermine the policies governing use of CORI data. Nevertheless, the restrictions advocated in the opposing argument are an unworkable alternative. The proper solution to this dilemma may be to ask the Legislature to balance the competing policy interests of protecting CORI data and providing access to court records.

A helpful way to explain the reasons enumerated above is to see them in contrast to the restrictions advocated in the opposing argument.

The opposing argument proposes that personally identifiable information in court records should be limited to a narrowly defined subset of information collected by the courts, but the preferable position is that court records should remain open with few restrictions that are based on legislative mandates or court rulings. Restrictions should be left to case-by-case adjudication in which the federal constitutional presumption of access is weighed

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[2] See Recommendation 6.3 of the Commission on the Future of the Courts, "Courts must become paperless," *Justice in the Balance: 2020, Report of the Commission on the Future of the Courts,* page 108; Goal 3 of the Court Technology Task Force, "Courts should actively seek to reduce the excessive amount of paper processed by the courts and users of the courts," *Report of the Court Technology Task Force: Adopted by the Judicial Council January 25, 1995,* page 26; and Goal III.B. 9 of the Judicial Council's March 1995 strategic plan, "Reduce the amount of paper processed by the courts and users of the courts," *Leading Justice into the Future: Judicial Council of California Long-Range Strategic Plan Adopted March 1995,* p. 14.

against specific arguments for exclusion of the public. Personally identifying information is absolutely essential for most meaningful uses of court records.

The opposition argues that *Westbrook* v. *County of Los Angeles*, 27 Cal. App. 4th 157, 32 Cal. Rptr. 2d 382 (1994), requires restricted electronic access to a court's criminal information. The underpinning for the argument is a single appellate case in an otherwise uncharted and controversial area. The argument extrudes a mandate from that case far beyond the precise problem presented to the Court of Appeal. This interpretation of the case only compounds and amplifies the court's questionable conflation of three quite disparate policy sources:

- the federal law governing information held by federal executive branch agencies—not courts;
- the California Constitutional right of privacy, underlying which there is no trace of legislative history addressing the behavior of courts; and
- the California law concerning criminal offender records information, again with respect to which there is no legislative history indicating an intent to sweep courts into the category of "local criminal justice agencies."

A court is not just another "criminal justice agency." Courts are in a radically different category. They are the forum in which all persons and organized entities in society (including the government itself) meet for resolution of competing legal claims and in which the state's subjection of the individual to the penalties of criminal law is contested.

Accommodations of privacy concerns that may be resolved by legislative generalities with respect to other branches of government, or even the administrative sector of the courts, cannot and should not be addressed by categorical domains of secrecy or access barriers with respect to case-related information held and used by courts to document particular civil and criminal proceedings, where the proceedings themselves are not deemed confidential by either statute or court order. Restrictions on information access should be left to case-by-case adjudication in which the federal constitutional presumption of access is weighed against specific arguments for exclusion of the public.

Privacy has always been severely compromised in the vast majority of court proceedings and records. It has been accommodated to any significant degree only in those special areas where the role of the courts has been to foster intensely personal and developmental concerns, such as the timely rehabilitation of juvenile delinquents, the resolution of familial or marital disputes and the administration of the affairs under guardianships or conservatorships.

To say that privacy dictates the stripping of court records of identifying particulars because those particulars may be far more easily made known to those to whom they are significant is radically to compromise the entire notion of why court records are public to begin with—that is, to allow the community to know what is happening in the courts. To say that one can know what is happening in any institution without knowing who is involved is simply preposterous. The question of who is involved is often, if not typically, the threshold item for determining whether a matter is of any interest or significance whatsoever.

If a policy determines that employers, landlords, and lenders should not take criminal history or court-determined liability into account in making transactional decisions in the marketplace, it should simply say so, and do what can be done to enforce that prohibition at the point of its violation. Our law now prohibits a number of similar discriminations—based on race, religion, national origin, ethnicity, sex, physical disability and age, for example—where proof of the discrimination may be difficult to establish in particular cases. And yet unquestionably the mere existence of the prohibition, coupled with the availability of a public enforcement mechanism and/or private remedy, is a strong influence in suppressing the disfavored discrimination.

This policing role is all that should and realistically can be done with respect to any discriminatory use of objective information about a person's identity or experience. It is not a role for the courts and certainly not a basis for judicial "initiative" in suppressing or retarding access to public information that could be used to the prejudice of individuals in certain circumstances.

The *Westbrook* court and the opposition who rely on it are fixated on private databases and privately composed virtual rap sheets. This fixation resonates with society's general anxiety about the massive accumulation, analysis, and transfer of personally identifying and potentiality detrimental information. But it does not lead to a solution that is consistent with either the presumption of open courts or with the tradeoffs implicitly made in an information-fueled economy. The restrictions contemplated by those who rely on *Westbrook* will not end or even significantly retard illegal uses of stigmatizing or potentially prejudicial personal information found in court records. It will simply make the accumulation process more costly and—to the extent that there are more steps in accomplishing it—more prone to inaccuracy and confusion. The risks of error creeping into private databases only increase with every extra procedure used in compiling them. A wholesale copy of a court's public files, or the presence of those files on-line for downloading, is far less likely to result in erroneous information than a piecemeal accumulation of data from individual records. The "dumbing down" of electronic access will leave commercially traded information more expensive and less reliable, and it is doubtful that anyone has an interest in that outcome. Those seeking jobs, rental housing, or credit will not be more "protected" by the fact that the decision-makers are using an information source that is costlier and more prone to error.

The *Westbrook*-driven positions taken by the opposition should be referred to the Legislature for a careful policy review and clarification. The central component of that decision—the court's interpretation of the statutes dealing with Criminal Offender Record Information—is after all a matter subject to legislative determination, and it is not uncommon for the Legislature to revisit a statutory provision in the light of a questioned or unforeseen judicial construction.

The courts should not bear the burden and the responsibility for regulating access to and secondary uses of court information, particularly the personally identifiable criminal and civil court record information held in electronic format. This recommendation flows from the idea that because there is potential for mischief and abuse of court information in electronic format and a congruent threat to privacy, courts must deny access to such records on the front end. In keeping with California's Public Records laws, the First

Amendment to the United States Constitution, and numerous United States Supreme Court decisions,[3] the more appropriate position is continued open access to records with strict—yet narrow—regulation and punishment of misuse of court information as now exists in paper records.

It would be ironic if the rule were to authorize a dramatically lesser amount of information than is currently available in paper format be accessible in electronic form via emerging electronic information networks, given that the California Legislature and the courts promote and tout the potential economic and social efficiencies of these networks. Such a policy would have the potential of increasing the administrative burden on the courts because they will be responsible for maintaining and disseminating both paper and electronic copies of court records not just for the foreseeable future but indefinitely. This seems antithetical to the recommendation in *Justice in the Balance: 2020,* which states: "Courts must become paperless," and "a comprehensive and integrated network should connect and serve the entire judicial branch, other agencies and the public." The adoption of a philosophy of closure would be antithetical to the ultimate economic, administrative, and societal goals of moving the courts from paper to electronic collection, creation, storage and dissemination of court information.

[3] See, e.g., *Richmond Newspapers, Inc.* v. *Virginia* (1980) 448 U.S. 555, 583; *El Dia, Inc.* v. *Herndez Colon* (D.P.R. 1991) 783 F. Supp 15, 21-23; *WJTV* v. *City of Cleveland* (N.D.Ohio 1988) 686 F. Supp. 177; *Caledonian-Record Publishing Co*. v. *Walton* (Vt. 1990) 573 A.2d 296, 299.